

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHELLE MARIE THOMPSON,) No. CV 15-9608 AS
Plaintiff,)
v.)
CAROLYN W. COLVIN,) **MEMORANDUM OPINION AND**
Acting Commissioner of Social)
Security,) **ORDER OF REMAND**
Defendant.)
)

Pursuant to Sentence 4 of 42 U.S.C. § 405(g), IT IS HEREBY ORDERED that this matter is remanded for further administrative action consistent with this Opinion.

I. PROCEEDINGS

On July 14, 2011, Plaintiff Michelle Marie Thompson ("Plaintiff") applied for supplemental security income benefits, alleging a disabling condition beginning February 1, 2010. (AR 135-41). On February 12, 2014, Administrative Law Judge ("ALJ") Robert

1 A. Evans examined the records and heard testimony from Plaintiff and
2 vocational expert ("V.E.") Elizabeth G. Brown-Ramos. (AR 29-44). On
3 March 6, 2014, the ALJ denied Plaintiff benefits in a written
4 decision. (AR 14-24). The Appeals Council denied review of the
5 ALJ's decision. (AR 1-4).

6

7 On December 14, 2015, Plaintiff filed a Complaint pursuant to
8 42 U.S.C. §§ 405(g) and 1383(c) alleging that the Social Security
9 Administration erred in denying benefits. (Docket Entry No. 1). On
10 April 28, 2016, Defendant filed an Answer to the Complaint, (Docket
11 Entry No. 14), and the Certified Administrative Record ("AR"),
12 (Docket Entry No. 15). The parties have consented to proceed before
13 a United States Magistrate Judge. (Docket Entry Nos. 11, 12). On
14 July 20, 2016, the parties filed a Joint Stipulation ("Joint Stip.")
15 setting forth their respective positions on Plaintiff's claims.
16 (Docket Entry No. 17).

17

18 **II. SUMMARY OF ALJ'S DECISION**

19

20 The ALJ applied the five-step process in evaluating Plaintiff's
21 case. (AR 14-16). At step one, the ALJ determined that Plaintiff
22 had not engaged in substantial gainful activity after the application
23 date. (AR 16). At step two, the ALJ found that Plaintiff's severe
24 impairments included chronic right knee pain, osteoarthritis, chronic
25 low back pain, depressive disorder and morbid obesity. (AR 16). At
26 step three, the ALJ found that Plaintiff's impairments did not meet
27 or equal a listing found in 20 C.F.R. Part 404, Subpart P, Appendix
28 1. (AR 16-17).

1 Before proceeding to step four, the ALJ found that Plaintiff had
2 the residual functional capacity ("RFC") to perform sedentary work
3 with the further limitations that Plaintiff could "understand and
4 follow simple instructions" and should not "deal directly with the
5 public." (See AR 17). In making his RFC finding, the ALJ ruled that
6 Plaintiff's statements regarding the intensity, persistence, and
7 limiting effects of her impairments were not credible because her
8 statements were inconsistent with objective medical evidence, her
9 self-reported daily activities, and her behavior during the hearing.
10 (AR 19, 22). The ALJ also summarized the medical evidence and
11 assigned weight to the opinions of various physicians, including
12 consultative psychiatric examiner Stephan Simonian, M.D. (AR 19-22).
13 The ALJ characterized Dr. Simonian's opinion as assessing, inter
14 alia, a "moderately limited ability to do detailed and complex
15 instruction [and] to relate to and interact with her supervisors, co-
16 workers, and the public" and assigned the opinion moderate weight.
17 (AR 21-22).

19 At steps four and five, the ALJ determined that Plaintiff was
20 unable to perform past relevant work but that she could seek work as
21 an addresser, a bonder (electronics), or a touch-up screener. (AR
22 22-24). Accordingly, the ALJ determined that Plaintiff was not
23 disabled within the meaning of the Social Security Act. (AR 24).

III. STANDARD OF REVIEW

27 This court reviews the Administration's decision to determine if
28 the decision is free of legal error and supported by substantial

1 evidence. See Brewes v. Commissioner of Soc. Sec. Admin., 682 F.3d
 2 1157, 1161 (9th Cir. 2012). "Substantial evidence" is more than a
 3 mere scintilla, but less than a preponderance. Garrison v. Colvin,
 4 759 F.3d 995, 1009 (9th Cir. 2014). To determine whether substantial
 5 evidence supports a finding, "a court must consider the record as a
 6 whole, weighing both evidence that supports and evidence that
 7 detracts from the [Commissioner's] conclusion." Aukland v.
 8 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (internal quotation
 9 omitted). As a result, "[i]f the evidence can support either
 10 affirming or reversing the ALJ's conclusion, [a court] may not
 11 substitute [its] judgment for that of the ALJ." Robbins v. Soc. Sec.
 12 Admin., 466 F.3d 880, 882 (9th Cir. 2006).

14 IV. PLAINTIFF'S CONTENTIONS

15
 16 Plaintiff raises two claims of error. First, Plaintiff claims
 17 that the ALJ improperly rejected portions of Dr. Simonian's
 18 assessment without explanation and failed to include limitations
 19 assessed by Dr. Simonian in the RFC. (Joint Stip. at 4-10, 13-15).
 20 Second, Plaintiff claims that the ALJ failed to provide clear and
 21 convincing reasons for rejecting her testimony as not fully credible.
 22 (Id. at 15-18, 23-26).

24 V. DISCUSSION

25
 26 After reviewing the record, the Court finds that Plaintiff's
 27 second claim warrants remand for further consideration. The Court
 28 declines to address Plaintiff's other claim.

1 **A. The ALJ's Rejection Of Plaintiff's Excess Pain Testimony Is Not**
2 **Supported By Substantial Evidence**

3

4 A claimant initially must produce objective medical evidence
5 establishing a medical impairment reasonably likely to be the cause
6 of her subjective symptoms. Smolen v. Chater, 80 F.3d 1273, 1281
7 (9th Cir. 1996); Bunnell v. Sullivan, 947 F.2d 341, 345 (9th Cir.
8 1991). Once a claimant produces objective medical evidence of an
9 underlying impairment that could reasonably be expected to produce
10 pain or other symptoms alleged, and there is no evidence of
11 malingering, the ALJ may reject the claimant's testimony regarding
12 the severity of her pain and symptoms only by articulating specific,
13 clear and convincing reasons for doing so. Brown-Hunter v. Colvin,
14 806 F.3d 487, 492-93 (9th Cir. 2015) (citing Lingenfelter v. Astrue,
15 504 F.3d 1028, 1036 (9th Cir. 2007)). In this case, because there is
16 no evidence of malingering, the "clear and convincing reasons"
17 standard applies.

18

19 Several portions of the administrative record are relevant to
20 Plaintiff's claim that the ALJ erroneously rejected her "excess pain"
21 testimony. (Joint Stip. at 15-18, 23-26). In a 2011 Exertion
22 Questionnaire, Plaintiff reported that she used crutches to walk,
23 struggled to stand in the shower, and generally took the bus anywhere
24 that she needed to go. (AR 165). Plaintiff claimed that "every
25 move" was painful and that she also experienced pain if she sat for
26 too long. (AR 165). Plaintiff further reported that she could wash
27 the dishes if she sat while doing so and that, twice a month, she
28 shopped for groceries with the assistance of her son and a mobility

1 scooter. (AR 166). Plaintiff claimed that she could do housework
2 for "about an hour" before pain prevented her from performing further
3 work. (AR 167). Plaintiff reported that she napped "maybe 2-3
4 hours" every day. (AR 167).

5
6 In a 2012 Adult Function Report, Plaintiff reported that it took
7 her thirty minutes to stand up each morning and that she had to walk
8 with a cane. (AR 190). Plaintiff stated that it also took her two
9 and a half hours to "wash up" every morning and that her ailments
10 generally prevented her from standing while dressing, bathing, caring
11 for her hair, shaving, and cooking. (AR 191). Plaintiff
12 acknowledged that she was able to prepare sandwiches, frozen dinners,
13 salads, turkey burgers, and foods prepared in a toaster oven. (AR
14 192). Plaintiff stated that she sometimes prepared food weekly due
15 to her difficulty standing and that it took her two and a half hours
16 to cook. (AR 192). Plaintiff claimed that she "use[d] Access," a
17 paratransit program, to go out at least three times a week and that
18 she shopped for groceries four times per month with the assistance of
19 a helper and a mobility scooter. (AR 193). Plaintiff acknowledged
20 that she could pay bills, count change, handle a savings account, and
21 use a checkbook and money orders. (AR 193). Plaintiff stated that
22 she went to the movies once a month and to church "when [she felt]
23 like giving up." (AR 194).

24
25 During her hearing, Plaintiff testified that she had last worked
26 in 2005 but had gotten "hurt" in 2009. (AR 32-34). Plaintiff
27 brought a walker to the hearing, and she testified that she was
28 unable to walk without the walker or a cane, although recently the

1 cane had not been giving her sufficient support. (AR 34). Plaintiff
2 testified that, although she was able to shower by herself, she
3 sometimes had to sit on a railing in the shower. (AR 34-35).
4 Plaintiff also testified that she could sit for about an hour at a
5 time before needing to stand and walk around using the walker. (AR
6 35-36). Plaintiff further testified that, using the walker, she
7 could stand without walking for about 45 minutes at the longest. (AR
8 36). Plaintiff clarified that her pain was "ongoing" and "always
9 there," even with medication. (AR 36). Plaintiff also testified that
10 her ailments prevented her from "go[ing] out, hav[ing] fun with
11 somebody, walk[ing], you know, whatever." (AR 37).

12

13 The ALJ rejected Plaintiff's pain testimony in the following
14 excerpt:

15

16 After careful consideration of the evidence, the [ALJ]
17 finds that [Plaintiff's] medically determinable impairments
18 could reasonably be expected to cause the alleged symptoms;
19 however, [Plaintiff's] statements concerning the intensity,
20 persistence, and limiting effects of her symptoms are not
21 credible to the extent they are inconsistent with the
22 [RFC]. First, the [ALJ] notes that [Plaintiff's]
23 activities of daily living, including preparing simple
24 meals (i.e., sandwiches, frozen meals, salad, turkey
25 burgers), using Access to get around, shopping with the use
26 of a scooter, occasionally attending church, paying bills,
27 counting change, handling a savings account, and using a
28

1 checkbook/money order, for example, are inconsistent with
2 her allegation of total disability.

3
4 The medical evidence of record also does not substantiate
5 [Plaintiff's] allegations of disabling limitations.
6 [Plaintiff's] complaints regarding the frequency, severity
7 and duration of her back pain, neck pain, knee pain, and
8 obesity do not justify any further limitations than those
9 based on the objective medical evidence and are generally
10 consistent with the limitations found. [. . .] In the
11 absence of objective medical evidence to support these
12 allegations, the ALJ gives minimal weight to [Plaintiff's]
13 testimony as to a total preclusion as to all work during
14 the adjudicative period. These allegations are well
15 accommodated in the [RFC] adopted in this case.
16 [Plaintiff] was noted to use a walker at the hearing,
17 however, as discussed below, the [V.E.] testified that the
18 use of a cane would NOT affect the sedentary jobs noted by
19 the [V.E.]. [. . .]

20
21 Additionally, after carefully observing [Plaintiff] at the
22 hearing, the [ALJ] further notes that her verbal responses
23 and overall demeanor were not suggestive of a person who is
24 experiencing disabling limitations. While these
25 observations are just one of many factors that the [ALJ]
26 has considered, she was able to enter and exit the hearing
27 room without much difficulty, and to answer questions, all
28 despite her alleged disabling limitations.

1 (AR 19, 22 (complete summary of medical evidence and citations
2 omitted)).

3

4 The ALJ's adverse credibility finding is not supported by
5 substantial evidence. First, the ALJ overstated the degree to which
6 Plaintiff's daily activities were consistent with the abilities
7 necessary to secure and maintain employment. For example, the ALJ
8 relied on evidence and testimony addressing Plaintiff's daily
9 activities but failed to note that Plaintiff performed most of the
10 cited activities infrequently, with assistance, and slowly or with
11 substantial pain. (AR 165-67, 190-94). Therefore, Plaintiff's
12 activities fail to support the ALJ's finding that Plaintiff can
13 secure and maintain employment or that Plaintiff's pain is not as
14 severe as she claims. The Ninth Circuit has cautioned that "the mere
15 fact that a plaintiff has carried on certain daily activities, such
16 as grocery shopping, driving a car, or limited walking for exercise,
17 does not in any way detract from her credibility as to her overall
18 disability. One does not need to be 'utterly incapacitated' in order
19 to be disabled." Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir.
20 2001) (finding "only a scintilla" of evidence supporting ALJ's
21 adverse credibility finding where claimant was able to go grocery
22 shopping with assistance, walk approximately an hour in the mall, get
23 together with friends, play cards, swim, watch television, read,
24 undergo physical therapy, and exercise at home); see also Reddick v.
25 Chater, 157 F.3d 715, 722-23 (9th Cir. 1998) (activities of daily
26 living affect a claimant's credibility "[o]nly if the level of
27 activity [is] inconsistent with [the claimant's] claimed
28 limitations"; ALJ erred by "not fully accounting for the context of

1 materials or all parts of the testimony and reports," resulting in
2 paraphrasing of record material that was "not entirely accurate
3 regarding the content or tone of the record").

4

5 The ALJ also rejected Plaintiff's testimony based on his own
6 observations of Plaintiff's conduct during and immediately following
7 the hearing. (AR 22). Although an ALJ's personal observations do
8 not necessarily render a decision improper, the Ninth Circuit has
9 repeatedly condemned so-called "sit and squirm" jurisprudence. See
10 Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999) (citing
11 Perminter v. Heckler, 765 F.2d 870, 872 (9th Cir. 1985)). Here, the
12 Court has no difficulty concluding that the ALJ's observations during
13 the fourteen-minute hearing, (AR 31, 44), provide insufficient
14 support for an adverse credibility finding. See Gallant v. Heckler,
15 753 F.2d 1450, 1455 (9th Cir. 1984) ("The fact that a claimant does
16 not exhibit physical manifestations of prolonged pain at the hearing
17 provides little, if any, support for the ALJ's ultimate conclusion
18 that the claimant is not disabled or that his allegations of constant
19 pain are not credible.").

20

21 The ALJ also discredited Plaintiff's testimony on the grounds
22 that it was not substantiated by medical evidence. (AR 19). This
23 reason, standing alone, is insufficient to support an adverse
24 credibility finding. Light v. Social Sec. Admin., 119 F.3d 789,
25 792-93 (9th Cir. 1997) ("[A] finding that the claimant lacks
26 credibility cannot be premised wholly on a lack of medical support
27 for the severity of his pain.").

1 **B. The Court Cannot Conclude That The ALJ's Error Was Harmless**

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3 "[H]armless error principles apply in the Social Security . . .
 4 context." Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012)
 5 (citing Stout v. Comm'r, Soc. Sec. Admin., 454 F.3d 1050, 1054 (9th
 6 Cir. 2006)). Generally, "an ALJ's error is harmless where it is
 7 'inconsequential to the ultimate nondisability determination.'" Id.
 8 (citing Carmickle v. Comm'r, Soc. Sec. Admin., 533 F.3d 1155, 1162
 9 (9th Cir. 2008)).

10

11 The Court cannot conclude that the ALJ's errors were harmless.
 12 The limiting effects of Plaintiff's pain are directly relevant to
 13 assessing her RFC. A claimant's RFC "may be the most critical
 14 finding contributing to the final . . . decision about disability."
 15 See McCawley v. Astrue, 423 F. App'x 687, 689 (9th Cir. 2011)
 16 (quoting SSR 96-5p). Here, Plaintiff's RFC was central to the ALJ's
 17 determination that there was work that she could perform despite her
 18 limitations. (AR 23-24). Because the Court cannot determine that
 19 the ALJ's errors were "inconsequential to the ultimate nondisability
 20 determination," the errors cannot be deemed harmless. See Carmickle,
 21 533 F.3d at 1162.

22

23 **C. Remand Is Warranted**

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25 The decision whether to remand for further proceedings or order
 26 an immediate award of benefits is within the district court's
 27 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000).
 28 Where no useful purpose would be served by further administrative

1 proceedings, or where the record has been fully developed, it is
2 appropriate to exercise this discretion to direct an immediate award
3 of benefits. Id. at 1179 ("[T]he decision of whether to remand for
4 further proceedings turns upon the likely utility of such
5 proceedings."). However, where the circumstances of the case suggest
6 that further administrative review could remedy the Commissioner's
7 errors, remand is appropriate. McLeod v. Astrue, 640 F.3d 881, 888
8 (9th Cir. 2011); Harman, 211 F.3d at 1179-81.
9

10 Here, the Court remands because the ALJ provided insufficient
11 support for his decision to discount Plaintiff's "excess pain"
12 testimony. The record does not affirmatively establish that the ALJ
13 was required to find Plaintiff credible, nor does it establish that
14 the ALJ would necessarily be required to find Plaintiff disabled if
15 these deficiencies were remedied. Remand is therefore appropriate.
16

17 The Court has not reached issues not discussed supra except to
18 determine that reversal with a directive for the immediate payment of
19 benefits would be inappropriate at this time. In addition to the
20 issues addressed in this order, the ALJ should consider on remand any
21 other issues raised by Plaintiff, if necessary.
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1 VI. CONCLUSION
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3 For the foregoing reasons, the decision of the Administrative
4 Law Judge is VACATED, and the matter is REMANDED, without benefits,
5 for further proceedings pursuant to Sentence 4 of 42 U.S.C. § 405(g).
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7 LET JUDGMENT BE ENTERED ACCORDINGLY.
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9 Dated: September 12, 2016

10 /s/
11 ALKA SAGAR
12 UNITED STATES MAGISTRATE JUDGE
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